Larry A. Hammond, 004049
Anne M. Chapman, 025965
OSBORN MALEDON, P.A.
2929 N. Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
(602) 640-9000
lhammond@omlaw.com
achapman@omlaw.com

John M. Sears, 005617
P.O. Box 4080
Prescott, Arizona 86302
(928) 778-5208
John.Sears@azbar.org

Attorneys for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. STEVEN CARROLL DEMOCKER, Defendant.	No. P1300CR20081339 Div. 6 **DEFENDANT'S RESPONSE TO STATE'S MOTION TO RECONSIDER DENIAL OF MOTION IN LIMINE TO PRECLUDE ANONYMOUS EMAIL**

Steven DeMocker, by and through counsel, hereby responds to the State's Motion to Reconsider Denial of Motion in Limine to Preclude Anonymous Email and respectfully requests that the Court deny the State's Motion. This response is based on the due process clause, the Fifth, Sixth, Eighth and Fourteenth Amendments and

Arizona counterparts, Arizona Rules of Evidence, Arizona Rules of Criminal Procedure and the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. There Is No "Good Cause" To Reconsider the Court's Ruling on the Anonymous Email and the State's Motion Should Therefore Be Denied Pursuant to Rule 16.1(d).

Arizona Rule of Criminal Procedure 16.1(d) provides as follows:

> Finality of Pretrial Determination. Except for good cause, or as otherwise provided by these rules, an issue previously determined by the court shall not be reconsidered.

The comment to Rule 16.1(d) further explains: "issues, once determined by a court ought not, without a showing of good cause, be reconsidered by the same court or another of equal jurisdiction."

On May 24, 2010, during jury selection and well after the date for pretrial motions,[1] the State filed a Motion in Limine to preclude evidence relating to an anonymous email that the State received in June of 2009.[2] The defense responded on June 1 and trial commenced on June 3. Although the State complains that argument was heard before it could reply, argument was heard on the morning of opening statements because of the State's extremely late filing of its motion.

After argument, the Court denied the motion on June 3. The State asked the Court to reconsider the motion the same day and the Court reiterated that the ruling stands but that the Court would consider it.

Judge Lindberg fell ill on June 17. Judge Darrow was appointed to the case on July 2. Trial recommenced on July 21. On July 15, the State filed a Motion to

---

[1] Arizona Rule of Criminal Procedure 16.1(b) requires pretrial motions to be made 20 days prior to trial.
[2] The defense disclosed the defense of third-party culpability on April 10, 2010.

Reconsider Denial of Motion in Limine to Preclude Anonymous Email.[3] The State's Motion simply repeats the arguments made to the Court on June 3. Judge Lindberg already considered the State's arguments regarding hearsay and *Machado* that are re-asserted in the Motion for Reconsideration. Judge Lindberg correctly rejected the State's arguments and issued his ruling. The State did not raise the issue of this ruling between June 3 and June 17. The State has made no showing of "good cause" as required by Rule 16.1 and the Motion should therefore be denied pursuant to Rule 16.1.

II. The Email is Admissible As Evidence of Third Party Culpability.

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky,* 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), *quoting California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). This right is secured by the Confrontation Clause of the Sixth Amendment, *Davis v. Alaska,* 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Compulsory Process Clause of the Sixth Amendment, *Holmes v. South Carolina,* 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); *Washington v. Texas,* 388 U.S. 14, 18-19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi,* 410 U.S. 284, 290 n. 3, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *State v. Oliver,* 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988), and article II, §§ 4 and 24 of the Arizona Constitution. As the United States Supreme Court has observed, "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers,* 410 U.S. at 302.

1. Standards for Admitting Evidence of Third Party Culpability.

Rules 401, 402 and 403 of the Arizona Rules of Evidence set forth the proper test for determining the admissibility of third-party culpability evidence. *State v. Gibson,* 202 Ariz. 321, 324 para 19, 44 P.3d 1001, 1004 (2002). "Th[e] standard of relevancy

[3] On August 20, the Court ordered the defense to respond to the motion by August 27, 2010.

[under Rule 401] is not particularly high." *State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988). When considering admissibility of evidence of third-party guilt, [t]he proper focus in determining relevancy is the effect the evidence has upon the defendant's culpability. To be relevant, the evidence need only *tend* to create a reasonable doubt as to the defendant's guilt." *Gibson*, 202 Ariz. at 324 para 16, 44 P.3d at 1004(emphasis added). See 1A Wigmore on Evidence s 142, 1t 1731 (Tillers Revision 1983) ("Of the other kinds of evidence [besides those specifically discussed] indicating a third person as the doer of the act, it can only be said that the inclination should always be to admit any one of them, unless totally without probative suggestion."). *See also Johnson v. United States*, 552 A.2d 513, 517 (D.C. 1989) (holding that proffered evidence need not prove another's guilt; rather "the evidence need only tend to create a reasonable doubt that the defendant committed the offense"); *State v. LeClair*, 425 A.2d 182, 186 (Me. 1981) ("Especially where the state's case is based on circumstantial evidence, the court should allow the defendant 'wide latitude' to present all the evidence relevant to his defense, unhampered by piecemeal rulings on admissibility") (citation omitted).

In *State v. Machado*, Division 2 of the Arizona Court of Appeals held that the trial court erred in precluding evidence of prior bad acts of a third party and in precluding an anonymous phone call confession. *State v. Machado*, 224 Ariz. 343, 230 P.3d 1158 (Az. App. 2010). In rejecting the proposition that Rule 404(b) applies to evidence of third party culpability, the court held that "the *Gibson* standards sufficiently protect the state from a defendant's improper use of other-act evidence." *Machado,* 224 Ariz. at para 29; 230 P.3d at 1171. The *Gibson* court held that "Rules 401, 402 and 403, Arizona Rules of Evidence, set forth the proper test for determining the admissibility of third-party culpability evidence." *Machado*, at para 30, p. 1171, citing *Gibson*. The *Machado* court continued, "[t]he supreme court's reasoning in *Gibson*

suggests it intended to establish a comprehensive test for determining admissibility of third-party culpability evidence... ." *Id.* at para 31, 1171.

The *Machado* court affirmed the *Gibson* court's identification of the two issues a court must consider in determining the admissibility of evidence of third-party culpability. First, "the evidence must be sufficiently relevant that it "tend[s] to create a reasonable doubt as to the defendant's guilt." Second, the probative value must outweigh the risk the evidence will prejudice the state or confuse the jury. *Id.*, citing *Gibson.*

The State objects that the email is hearsay and should be precluded on this basis. However, the *Machado* Court, in considering the admissibility of an anonymous confession made in a telephone call, held that it was error for the trial court to preclude the call based on a finding that it was inadmissible hearsay. Citing *Chambers*, the *Machado* Court explained,

> These cases stand for the proposition that, when assessing the admissibility of evidence proffered by an accused, the Sixth Amendment requires that courts be guided not only by the express terms of the pertinent rules of evidence, but, in applying those express terms, by the core principles of relevance and reliability that underlie them.

Id. para 13, 230 at 1167 (internal citation omitted) (emphasis added). Therefore, under both United States Supreme Court and Arizona precedent, it would be error for the Court to exclude the email as hearsay as suggested by the State.

2. The Email has Indicia of Reliability.

In order to preclude the evidence as unreliable, the State would have to demonstrate that "no reasonable person could conclude, based on corroborating and contradictory evidence, that the statements could be true." *Id.* "In conformity with *Chambers,* our Supreme Court affirmed the preclusion of a co-defendant's exculpatory confession as inadmissible hearsay *only after finding,* pursuant to the corroboration

requirement of Rule 804(b)(3), Ariz. R. Evid., *that no reasonable person could conclude, based on corroborating and contradictory evidence, that the statements could be true.*" *Machado*, para 13, 230 at 1167. The State cannot possibly meet this burden. There are several pieces of corroborating evidence and indicia of reliability for the anonymous email.

The email suggests that Mr. Knapp was involved in a "prescription drug deal." There is corroborating evidence that Mr. Knapp had an addiction to prescription drugs from Mr. Knapp's divorce records and from Ms. Saxerud, Mr. Knapp's ex-wife. (Bates 2325). Mr. Knapp also had seven different prescription drugs in his system at the time of his death, as evidenced by the toxicology report from the autopsy.

The State investigated and determined that the email was sent from an internet café in North Phoenix. The person set up the email account on the same day the email was sent. The user searched for an email address for Joe Butner, Mark Ainley and Sheila Polk. The user attempted to send the email to both Mr. Sears and Mr. Butner at the format for the Arizona State Bar's email address.

Other indicia of reliability exist as well. For example, the email states that Ms. Kennedy and Mr. Knapp used to drink wine together at night at Ms. Kennedy's home. The State has several interviews with Mr. Knapp before his death where he indicates this is true. The email is also very detailed. It includes information about two specific weapons, the number of perpetrators, the gender of the perpetrators, the staging of the scene, that Ms. Kennedy was in the back bedroom, that Ms. Kennedy was on the phone, and other details. The State can not disprove any part of the story from this email.

These indica of reliability and corroborating facts meet the Sixth Amendment requirement that courts be guided not only by the express terms of the pertinent rules of evidence, but, by the core principles of relevance and reliability that underlie them. The State is not able to meet the very high burden of demonstrating that "no reasonable

person could conclude, based on corroborating and contradictory evidence, that the statements could be true." Therefore this evidence is admissible under *Chambers* and *Machado*.

3. The Email Tends to Create a Reasonable Doubt as to Defendant's Guilt.

The anonymous email in question was sent to Mr. Sears and Mr. Butner in June 2009. It contains a detailed description of how and why the murder was committed and how Mr. Knapp may have brought the crime about through his involvement in a criminal prescription drug enterprise in Phoenix. The email describes the number and gender of the perpetrators and describes a very detailed sequence of events. The email mentions that Ms. Kennedy was in a back bedroom and was on the telephone. The email describes two weapons used and what happened to the weapons. The email discusses scene "staging" which has been alleged by the State at trial. It was sent to both Mr. Sears and Mr. Butner, although to an incorrect address for Mr. Butner. The sender then sent an additional email to Mr. Sears asking him to forward the email to Mr. Butner.

This evidence *tends* to create a reasonable doubt as to Mr. DeMocker's guilt. It suggests that three people, not Steven DeMocker, were responsible for the murder of Carol Kennedy. It also suggests that weapons other than a golf club were used. The State does not dispute that this evidence tends to create a reasonable doubt as to defendant's guilt. In fact, the State's objection to this evidence is precisely because of the doubt created by this email.

4. The probative value of the email outweighs the risk the evidence will prejudice the state or confuse the jury.

The probative value of the email is obvious in that it offers a plausible alternative explanation for the murder of Carol Kennedy that tends to exculpate Mr. DeMocker. The jury has been told who Mr. Knapp was and where he lived. There is no risk of

prejudice or confusion to the jury from the email. The State has not even argued that there is any such risk.

III. The Email is Also Admissible as Proof of the State's Myopic Focus on Mr. DeMocker as a Suspect and Failure to Investigate Other Leads.

If the Court determines, over defense objection, that it will reconsider the Court's ruling on this evidence and that the evidence is not admissible because it is hearsay, the Court should admit the evidence for the limited purpose of demonstrating the State's singular, myopic focus on Mr. DeMocker as a suspect and its failure to investigate other leads.

The State's investigation of the email has been focused almost exclusively on trying to tie the email to Mr. DeMocker or his family. The State subpoenaed the cell phone tower records for Mr. DeMocker's children and girlfriend to determine if they were near the internet café on the day the email was sent. The State's other investigative effort included interviewing several former inmates who were housed with Mr. DeMocker to ask if the inmates had been asked by Mr. DeMocker to send the email. The State's failure to investigate the email, other than to inculpate Mr. DeMocker or his family, is further evidence that the State had a myopic focus on Mr. DeMocker, that it destroyed exculpatory evidence and that it otherwise failed to do what they should have done to investigate Carol Kennedy's murder.

CONCLUSION

The State's Motion for Reconsideration should be denied. There is no good cause for reconsideration as required by Rule 16.1(d). More importantly, Mr. DeMocker has a right to present evidence that tends to create a doubt as to his guilt, as this email most certainly does. There is no suggestion that the email would be confusing or prejudicial. The email has indica of reliability as detailed above. "Few

rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers,* 410 U.S. at 302, 93 S.Ct. 1038.

DATED this 27th day of August, 2010.

By: _____

John M. Sears
P.O. Box 4080
Prescott, Arizona 86302

OSBORN MALEDON, P.A.
Larry A. Hammond
Anne M. Chapman
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793

Attorneys for Defendant

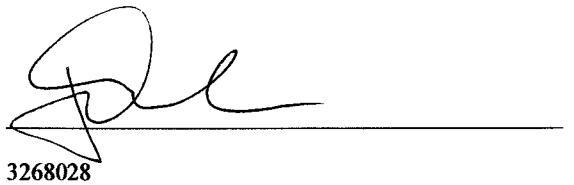
ORIGINAL of the hand delivered this 27th day of August, 2010, with:

Jeanne Hicks
Clerk of the Court
Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

COPIES of the foregoing hand delivered this this 27th day of August, 2010, to:

The Hon. Warren R. Darrow
Judge Pro Tem B
120 S. Cortez
Prescott, AZ 86303

Joseph C. Butner, Esq.
Jeffrey Paupore, Esq.
Prescott Courthouse box



3268028